INDEX

	Page
INTRODUCTORY STATEMENT	2
ARGUMENT	2
1. The Petition Does Not Present Sufficient Reason for this Court To Review the Matters Raised by Question Number One	2
2. The Petition Does Not Present Sufficient Reason for this Court To Review the Matters Raised by Question Number Three	12
CONCLUSION	20

TABLE OF AUTHORITIES

CASES:

American Airlines v. Civil Aeronautics Board (D.C. Cir. 1951), 192 F. 2d 417 4
Acquisition of Marquette by TWA, Supplemental Opinion, 2 C.A.B. 409 (1940) 5, 16
Ashbacker Radio Corporation v. Federal Communications Commission, 326 U.S. 327 (1945) 4
Braniff Airways, Inc. v. Civil Aeronautics Board (D.C. Cir. 1960), —— F. 2d ——, 6 Avi. 17,894 5
Civil Aeronautics Board v. State Airlines, Inc., 338 U.S. 572 (1950) 4
Continental Southern Lines v. Civil Aeronautics Board (D.C. Cir. 1952), 197 F. 2d 397, *cert. den.* 344 U.S. 831 4
Ex Parte Republic of Peru, 318 U.S. 578 (1943) 12
Federal Trade Commission v. American Tobacco Company, 274 U.S. 543 (1927) 14
Frontier Airlines, Inc. v. Civil Aeronautics Board (D.C. Cir. 1958), 259 F. 2d 808 5
Kansas City-Memphis-Florida Case, 9 C.A.B. 401 (1948) 17
Magnum Import Company v. De Sporturno Coty, 262 U.S. 159 (1923) 11

Page

National Labor Relations Board v. Pittsburgh Steamship Company, 340 U.S. 498 (1951) 15
New York-Florida Case, Supplemental Opinion, C.A.B. Docket 3051 *et al.*, Order E-10884 (December 21, 1956) 18
North American Airlines v. Civil Aeronautics Board (D.C. Cir. 1956), 237 F. 2d 209 5
Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70 (1955) 4
Seven States Area Investigation, C.A.B. Docket 7454, *et al.*, Order E-13254 (December 8, 1958) 19
Smith Bros., Revocation of Certificate, 33 M.C.C. 465 (1942) 16, 17
United Airlines, Inc. v. Civil Aeronautics Board (D.C. Cir. 1946), 155 F. 2d 169 .....4, 9, 10
United States v. Rock Island Motor Transit Company, 340 U.S. 419 (1951) 16
United States v. Seatrain Lines, Inc., 329 U.S. 424 (1947) 16

STATUTES:

Administrative Procedure Act, 60 Stat. 237 (1946), 5 U.S.C. §§ 1001-1009 (1952)

Section 8(b) (60 Stat. 242, 5 U.S.C. § 1007(b)) .. 2
Section 10(e) (60 Stat. 243, 5 U.S.C. § 1009(e)) .. 2

Civil Aeronautics Act of 1938, 52 Stat. 977 (1938), 49 U.S.C. §§ 401-705 (1952)

Section 2 (52 Stat. 980, 49 U.S.C. § 402) 2
Section 401 (52 Stat. 987, 49 U.S.C. § 481) 2, 3, 4, 5, 6, 7
Section 1005(f) (52 Stat. 1023(f), 49 U.S.C. § 645(f)) 2

Federal Aviation Act of 1958, 72 Stat. 737 (1958), 49 U.S.C. §§ 1301-1542

Section 401 (72 Stat. 754, 49 U.S.C. § 1371) 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 785

EASTERN AIR LINES, INC.,

Petitioner,

v.

CIVIL AERONAUTICS BOARD,

Respondent.

BRIEF OF DELTA AIR LINES, INC., IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Delta Air Lines, Inc. ("Delta"), an Intervenor below on the side of Respondent, the Civil Aeronautics Board (the "Board" or the "CAB") prays that insofar as Questions One and Three are concerned, this Court will deny the Petition for Writ of Certiorari filed in No. 785 by Eastern Air Lines, Inc. ("Eastern"). The Petition seeks review of the judgment of the United States Court of Appeals for the Second Circuit entered in the above-entitled case on October 7, 1959, rehearing denied December 15, 1959.[1]

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[1] Citations to the Opinion below will be to Appendix B of the Petition in No. 785, *e.g.*, "(B7)". References to material in the printed Joint Appendix will be by page number thereof, *e.g.*, "(J.A. 123)".

INTRODUCTORY STATEMENT

The Petition presents four questions for possible review by this Court. Only Questions One and Three affect Delta, and this Reply Brief, therefore, will discuss only those matters presented by the Petition in support of those two questions. Delta expresses no opinion as to whether the Court in this case should review the matters presented by Question Four[1] except that if a Writ of Certiorari is issued concerning the latter matter, to request that review be limited strictly to that Question.

ARGUMENT

I.

The Petition Does Not Present Sufficient Reason for this Court To Review the Matters Raised by Question Number One

Question No. 1, as stated by Eastern:

> May the Board, required by statute (Civil Aeronautics Act of 1938 § 1005(f), 49 U.S.C. § 645(f); Administrative Procedure Act §§ 8(b), 10(e), 5 U.S.C. §§ 1007(b), 1009(e)) to make adequate findings on the elements of public convenience and necessity before certificating a new air service (Civil Aeronautics Act of 1938 §§ 2, 401(d), 49 U.S.C. §§ 402, 481(d)) lawfully certificate a new service in a given market but refuse to make findings measuring the expectable revenues or volume of traffic against expectable costs of operation and capacity in the market?

The precise reasons why Eastern feels that this Court should review the matters raised by Question One are not clear. Eastern does not allege that there is any conflict between decisions of the United States

[1] Many of the matters raised in Question Two are also raised by Eastern, in much the same form, in its Petition in No. 777. In that case, these matters are of immediate concern to Delta, and Delta has responded to them in its Reply Brief in No. 777.

Courts of Appeal or of any other Courts with respect to this question.[1] Nor are any other of the illustrative reasons which are set forth in this Court's Rule 19 specifically mentioned by Eastern.

Eastern, however, does try to create the illusion that there is involved here an important question of federal law which has not been, but should be, settled by this Court (Rule 19[b]). Basically, the contention is that the Second Circuit has sustained an opinion of the CAB under Section 401 of the Civil Aeronautics Act[2] although the agency opinion in one aspect is not supported by findings of a type which Eastern believes should be required under that section of the statute.

But there actually is no important question open for settlement by this Court. Eastern's own attempt to justify the requested review makes this fact clear.

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[1] In passing, Eastern (Petition, pp. 13-16) mentions that the growth and development of the airline industry "has been marked by varying and inconsistent interpretations" of the statutory section involved, "and a noticeable lack of uniform application of the interpretations placed on it by the Board," and that the matters concerning which Eastern seeks review are "increasingly involved before the Board, and the Courts of Appeal, and with increasing inconsistency of treatment." But these general statements are nowhere supported in the Petition by even a single reference to "inconsistent" court decisions concerning these matters. Eastern also implies (Petition, p. 15) that the approach of the Court below was "divergent" from the approach of the District of Columbia Circuit in a related case, and further alleges, "in at least one instance, in direct conflict." Eastern's own Petition shows, however, that the only instance of actual conflict even alleged to exist concerns Question Two of the instant Petition, not Question One, or Questions Three or Four. Nor is any alleged "divergency" with respect to Question One ever explained.

[2] 49 U.S.C. 481 (now Section 401 of the Federal Aviation Act of 1958, 49 U.S.C. 1371), set forth in Appendix A of the Petition in No. 785, pp. A6-A8.

First, Eastern relies on the mere statement that neither this nor any other Court ever has "definitively interpreted" Section 401 (Petition, pp. 13 and 16). Standing alone, of course, the statement—whether true or false—cannot justify burdening this Court with review of the Second Circuit's decision. The Court cannot be expected to "definitively interpret" a statutory provision unless an overriding question of public interest, and not just Eastern's own interest, is involved. As the Court said in *Rice* v. *Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74 (1955):

> "A federal question raised by a petitioner may be 'of substance' in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants . . ."

Furthermore, Eastern's allegation in any event is incorrect. As the cases cited in the margin[1] establish,

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[1] In addition to the many cases concerning completed or intended CAB action under Section 401 in relation to this Court's Ashbacker doctrine (*Ashbacker Radio Corp.* v. *Federal Communications Commission*, 326 U.S. 327 [1945]), cited at p. 20 of the Petition, cases construing Section 401 include the following: *Civil Aeronautics Board* v. *State Airlines, Inc.*, 338 U.S. 572 (1950) (sustaining CAB award of route to a carrier that had not even applied for the specific route and therefore had made no detailed proposal regarding its operation); *United Air Lines, Inc.* v. *Civil Aeronautics Board* (D.C. Cir. 1946), 155 F. 2d 169 (approving Board findings on profit potential and possible diversion, although the findings were in general terms, not expressed in dollar amounts, and stating, "It could not be said that such a forecast in general terms is fatally defective merely because no one could predict with precision the probable net revenue in dollar amounts"); *American Airlines, Inc.* v. *Civil Aeronautics Board* (D.C. Cir. 1951), 192 F. 2d 417 (discussing the type of finding needed to justify a certification under Section 401); *Continental Southern Lines* v.

Section 401 *has* been interpreted by this and other Courts on a number of occasions, so that there is an established judicial interpretation as to the type of findings necessary to support a certification under the section.[1]

Next, Eastern tries to lend substance to the alleged need for a "definitive interpretation" of the statute by implying that without such a new definition, despite the many agency and the Court decisions which have been rendered under Section 401 (the Act was passed in 1938), the content and meaning of the "public convenience and necessity" standard of that section will

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Civil Aeronautics Board (D.C. Cir. 1952), 197 F. 2d 397, *cert. den.* 344 U.S. 831 (emphasizing the criteria of the Act which the Board must consider in determining the "public convenience and necessity"); *North American Airlines* v. *Civil Aeronautics Board* (D.C. Cir. 1956), 237 F. 2d 209 (upholding CAB denial of application under Section 401 as not required by "public convenience and necessity"); *Frontier Airlines, Inc.* v. *Civil Aeronautics Board* (D.C. Cir. 1958), 259 F. 2d 807 (approving the use of so-called "beyond area" data in determining "public convenience and necessity"); *Braniff Airways, Inc.* v. *Civil Aeronautics Board* (D.C. Cir. 1960), ... F. 2d ....., 6 Avi. 17,894 (upholding CAB route certification to a carrier which had made no detailed proposal regarding its operation, and approving general finding that the benefits of authorization "will outweigh any adverse effects on Braniff that are likely to result").

[1] Furthermore, the "public convenience and necessity" standard is not unique to airline law, but also is found in such Federal Statutes as the *Motor Carrier Act*, 49 U.S.C. 301, *et seq.* and the *Water Carrier Act*, 49 U.S.C. 901, *et seq.*, and in numerous state statutes. Court decisions under such statutes—particularly the Motor Carrier Act—are numerous and are helpful in determining the Congressional intent in Section 401 of the Civil Aeronautics Act. As the Board has declared, the Civil Aeronautics Act was patterned upon the Motor Carrier Act, and the aviation statute therefore ". . . should have like interpretation application and effect" *Acquisition of Marquette by TWA*, Supplemental Opinion, 2 C.A.B. 409, 412 (1940).

be in doubt (Petition, pp. 13-14). This is a strange argument to be raised by Eastern at this time and in this case, because *Eastern itself told the Court below that the elements of "public convenience and necessity" under Section 401 are clear and definite,* and three in number. We quote from Eastern's Brief to that Court, page 43:

> "A contemporaneous construction given to that language [Section 401(d)] by the Board in *United Air Lines, Red Bluff Operations,* 1 C.A.A. 778, 779-80 (1940) *resolved the basic elements of public convenience and necessity germane to proceedings such as this* into the following queries:
>
> (1) whether the new service will serve a useful public purpose, responsive to a public need; and
>
> (2) whether this purpose can and will be served as well by existing lines or carriers; and
>
> (3) whether it can be served by the applicant with the new service without impairing the operations of existing carriers contrary to the public interest.
>
> *"The basic elements of public convenience and necessity are the same today as they were in 1940. Their strength has not been vitiated by any decision of the Board nor any Act of Congress"* (Footnotes omitted; Emphasis Added).

Eastern's contention below was that in granting the applications of which Eastern complains, the Board did not make sufficient findings to support its implicit, affirmative answers to each of those three, clear questions. Eastern did not contend below as it does now, that the history of Section 401 has been marked "by varying and inconsistent interpretations," or by "a noticeable lack of uniform application" (Petition,

p. 13), resulting in "confusion" as to its requirements (Petition, p. 14). The meaning of that Section was taken as settled by Eastern at earlier stages of this appeal.

Where, then, is the important public question which this Court is supposed to settle? Eastern makes one other attempt to create the illusion of such a question, in its request that this Court interpret the term, "public convenience and necessity" as used in Section 401, to require a specific finding in each case weighing the size of a market against the capacity to be offered by all carriers, and the cost to all of serving it (Petition, pp. 16-17). In this respect Eastern is not seeking a determination of the elements of "public convenience and necessity," but only a rule dictating a fact-finding method to be used in determining whether or not those elements exist in a particular case.

As Eastern admits (Petition, p. 12), *this* argument *was* made to the Court below. Eastern now says that the Court did not rule upon it (*ibid.*), but Eastern is wrong. The argument was presented below in support of Eastern's contention that the Board had not made adequate findings concerning the last of the three ultimate questions which Eastern, in the above quotation, said the Board had to answer in a Section 401 proceeding (which question Eastern described as whether a useful public purpose can be served by the applicant "without impairing the operations of existing carriers contrary to the public interest"). The Second Circuit *did* rule on this contention, specifically finding that the Board had determined that existing services were inadequate so that the new services were needed, and that the "Board's findings on size of market and diversion . . . [were] . . . adequately stated

and supported by substantial evidence" (B9-B10). The Court also found that Eastern, as the existing carrier, had not sustained its own burden to show the diversion which it might suffer (B10, footnote 15).

The fact that the Court below did not require a specific relation of traffic to expenses as requested by Eastern may be taken as a deliberate decision that such a relation is not necessary in order to determine whether an existing carrier will be impaired "contrary to the public interest" where, as here, there *are* ample findings as to the expectable size of the market and the diversion, if any, which the existing carrier might suffer. That such a decision was intended by the Court is clear from the fact that Eastern's Petition for Rehearing, which specifically requested a ruling that such a traffic/expense relation is necessary, was denied without further opinion.

The Court below, therefore, approved the method used by the Board to determine the possible impact of the new services on Eastern (*i.e.,* the Board's measurement of the likely diversion, if any, which Eastern might suffer, in relation to the Board's measurement of the expectable traffic market and Eastern's likely future share), finding the Board's decision well stated and amply supported, and refused to require use of Eastern's suggested, alternative method of specifically relating Eastern's expectable future traffic against an estimate of the costs which Eastern might incur in serving that traffic.

This refusal by the Court below to enforce use of Eastern's method is reasonable, because Eastern's future expenses are a matter largely within Eastern's control and thus not susceptible to accurate forecast. As the Board pointed out in this very case, the regu-

lated air carriers have the power, and indeed, the duty, to adjust their operations (which determine their expenses) in relation to the amount of competition which the Board finds necessary in a particular market to serve fully the public interest (Order E-13024, J.A. 1334-1336).

In *United Air Lines* v. *Civil Aeronautics Board, supra,* a contention was made that the Board's decision was fatally defective because it contained no findings as to revenues to be derived and expenses to be incurred in the operation of a new route by the carrier which was certificated, Western Airlines. The kernel of the contention there was that the economic effect of Western's selection—a key reason for the decision—could not be told without a finding of Western's net revenue from the proposed new operations. In approving the Board's action, the District of Columbia Circuit noted that there was not even any evidence in the record as to such revenues and expenses, but found such dollar estimates unnecessary in any event. The Court noted that the factors from which the Board's conclusion in that case had to be fashioned were not dollar factors:

> "... In large part they are imponderables. The economic and competitive desirability of the maintenance of Western was not measurable in dollars. Neither was the contrary competing consideration, the convenience of a large portion of the traveling public. There is no formula for combining these elements into a conclusion. . ." (155 F. 2d 169, at 175).

Thus, rather than speculate as to what service Eastern actually might operate in the future, and therefore what its costs might be, the Board determined what

the size of markets should be and what share of those expectable markets Eastern should obtain in a future year if it operated a normal schedule pattern (J.A. 888-890; 899-901; 925-930; 1318-1319; 1326-1327; 1333-1334; 1472-1477; 1479-1481; 1490-1493). The Board found that despite the new services, Eastern would still realize *more* revenues from the routes, even in the first year of operation, than it did before the new services were authorized (J.A. 1481; 1490-1493). Thereafter, the Board further found, Eastern would share in the increased revenues to result from traffic growth and from expected market stimulation under the spur of new competition (J.A. 1492-1493). In addition, the Board found that Eastern would remain a dominant carrier along the routes involved (J.A. 1492). Thus, unless Eastern artificially inflates its own costs, its profit position should remain firm.

This was the procedure which the Court below found to be reasonable in refusing to enforce use of Eastern's alternative, more speculative method. And in this connection, it is well to recall the role of the Courts of Appeal in disposing of questions such as are here involved. As the District of Columbia Circuit said in *United Air Lines, Inc.* v. *Civil Aeronautics Board, supra:*

> "... The ascertainment of the facts in each particular phase of the problem and the application of the legislative mandate to the facts thus ascertained are functions susceptible of delegation by the legislature. The execution of the legislative mandate is, of course, a responsibility of the executive. In this development operation, the function of the judicial branch of government is inherently limited. The courts must make certain that the legislative enactment is within Constitutional limi-

> tations, that the executive program is within statutory limitations, and that a disputed executive action is within the terms of the legislative mandate, fairly based on facts fairly found, and not arbitrary, capricious or fanciful. Beyond this, in a national project of this sort, the courts cannot go" (155 F. 2d 169, at 171-172).

Eastern's contention under Question One thus boils down to this: Although the Court below *did* find that the Board used an intelligible, and adequately documented, method to determine the *undisputed* elements of "public convenience and necessity," and *did* fairly determine them upon facts fairly found, the Court should have required use of a *different method*—a different sort of subsidiary finding—to support that determination. Eastern is merely arguing, in other words, that the Court below was wrong in approving the fact-finding method actually utilized by the Board rather than requiring use of a method which Eastern thinks is better.

In so arguing, however, Eastern misconceives the purpose of the certiorari procedure. The power to review by writ of certiorari was not conferred upon this Court for purposes of merely correcting an opinion of a lower Court. Something more than that is needed. As this Court said in *Magnum Import Co.* v. *De Spoturno Coty,* 262 U.S. 159, 163 (1923):

> "The question how the court should exercise this power next arises. The jurisdiction to bring up cases by certiorari from the circuit courts of appeals was given for two purposes: first, to secure uniformity of decision between those courts in the nine circuits; and, second, to bring up cases involving questions of importance which it is in the public interest to have decided by this court of

> last resort. *The jurisdiction was not conferred upon this court merely to give the defeated party in the circuit court of appeals another hearing.* Our experience shows that 80 percent of those who petition for certiorari do not appreciate these necessary limitations upon our issue of the writ. . . ." (Emphasis added) [1]

It is clear from the foregoing that Question One presents no necessity for securing uniformity of decision between the Courts of Appeals, and does not attempt to bring to this Court a matter of importance which the public interest requires the Court to resolve. To the contrary, in this respect, Eastern is one of the 80 percent of petitioners for certiorari—a disappointed appellant, merely seeking another hearing.

Question One does not justify the issuance of a writ.

II.

The Petition Does Not Present Sufficient Reason for this Court To Review the Matters Raised by Question Number Three

Question No. 3, as stated by Eastern:

> Is it lawful for the Board, in airline "new route" proceedings, to announce its determinations, prior to consideration of all relevant and material portions of the record, by "press release," without supporting reasons or consideration of all pertinent and material fact?

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[1] Although the *Magnum* case was decided before the amendments made by the Judiciary Act of 1925, the force of the above-quoted language has not been vitiated. The essence of the Act of 1925 was curtailment of this Court's appellate jurisdiction as a measure necessary for the effective discharge of the Court's functions (*Ex Parte Republic of Peru*, 318 U.S. 578, 600 (1943)). Furthermore, the quoted language from *Magnum* has been cited with approval within just the past few years, *Rice* v. *Sioux City Memorial Park Cemetery, supra*, 349 U.S. at 74.

Question Three involves Eastern's contention, made to the Court below, that a press release issued by the Board some six months before its opinion, "fettered" the Board's "discretion and precluded any open-minded consideration of the facts in the preparation of its formal decision" (Petition, pp. 22 and 26-31).

Eastern's contention turns upon its belief that the press release actually was "a decision" (Petition, p. 30) and, in fact, was the final decision so that thereafter the Board could do nothing but rationalize conclusions previously reached (Petition, pp. 26-31).

The Second Circuit rejected these arguments. The Court had before it the same evidence upon which Eastern based its contentions, but the Court reached a different conclusion, namely, that the press release did not constitute a final decision (B6-B7). The Court pointed to the Board's language in the press release itself which stated that the release did not constitute a decision, but that the decision would be entered and issued later (*ibid.*). The Court said:

> ". . . We construe this language to mean that the announced awards did not constitute final determinations but were tentative only, and that there were to be no definitive awards until the issuance of the Board's formal opinion . . ." (B7).

Eastern, however, also relied on the fact that when finally issued, the awards made by the decision in this case coincided exactly with those announced in the previous press release, and claimed that this established that the decision represented nothing more than a formalization of conclusions previously reached. The Court also considered this evidence, and the other data

before it, and again reached a different conclusion than Eastern. It said:

> ". . . We only indicate that Eastern's claim of prejudgment is unsound. Eastern does not contend that the interval between the completion of oral argument and the Board's tentative decision was so short that it precluded thoughtful consideration of the evidence presented. Moreover, if the careful marshalling of facts required in drafting an opinion should have indicated that a different decision was proper, the tentative decision announced in the press release need not have prevented the Board from reaching a different decision. Hence we hold that the press release procedure did not deny Eastern a fair hearing" (B7).

What is involved, therefore, is a situation where the decision of the Court of Appeals turned upon its fair assessment of the evidence—an assessment which led it to different conclusions than those urged upon it by Eastern. Eastern is now asking this Court to again assess the record and disagree with the conclusions of the Court below. Even if it be assumed that the pertinent evidence is susceptible of differing interpretations, this Eastern request does not present a subject to which this Court's certiorari power properly attaches. As the Court said in *Federal Trade Commission* v. *American Tobacco Company,* 274 U.S. 543, 544 (1927), the "usual rule" which it follows is:

> ". . . non-interference where conclusions of circuit courts of appeals depend on appreciation of circumstances which admit of different interpretations . . ."

In that case proper decision of the controversy also depended upon a question of fact (as here: do the facts establish that the Board predetermined the case?)

and, although certiorari had been granted, the Court later determined that it should not interfere, and affirmed the judgment on the above-quoted ground alone. Also see *National Labor Relations Board* v. *Pittsburgh Steamship Company,* 340 U.S. 498, 502-503 (1951).

Even if this Court in rare cases were inclined to reassess a record, there clearly is no basis for doing so here. In its attempt to persuade the Court otherwise, Eastern makes much of a contention that the Board issued its press release first and then, in reaching the actual decision during the next six months, utilized air traffic survey and financial data which was not in existence at the time of the press release (Petition, pp. 22 and 29). On the assumption that these data were essential to the Board's decision, Eastern feels that they could not fairly have been considered because the Board had already announced its "predetermination." Eastern concludes that the data were merely "used" to make the opinion conform with the press release announcement (Petition, pp. 22, 29 and 30).

This argument, too, was presented to the Court below, but it did not persuade that Court to infer the evils which Eastern infers from the facts. This Court should understand that the air traffic data used by the Board were available to it pursuant to a stipulation entered into by all parties, including Eastern (J.A. 195-196). This stipulation (set forth at J.A. 1506-08) specifically provided that such traffic and financial data should be incorporated into the record as it became available up until the time of the Board's *final* decision (stipulation, Nos. 6-10, J.A. 1507-08).

As the Court below found, the press release was far removed from the actual final decision in the proceed-

ing. Even the Board's September 30, 1958 decision (issued six months after the press release) was not the final decision. Until a certificate is issued *and made effective,* an airline route proceeding is not finalized. Once the certificate *is* made effective, the administrative proceeding *is* terminated and the last-previous decision can be considered the final one. But until that time, the Board is free—and has a duty—to consider and reconsider all data of record, and to issue and amend its decisions as it deems necessary.

This has clearly been recognized to be so under the Motor Carrier Act which, insofar as here pertinent, is similar in content and purpose to the Civil Aeronautics Act.[1] In *United States* v. *Rock Island Motor Transit Company,* 340 U.S. 419, 448 (1951), this Court said:

> "... the certificate is the final act or order that validates the operation. Until its form and content are fixed by delivery to the applicant, the power to frame it in accordance with statutory directions persists."

Both the *Rock Island Case* and *United States* v. *Seatrain Lines, Inc.,* 329 U.S. 424 (1947), cited with approval the following language of the ICC concerning certification processes:

> "*We may issue decision upon decision, and order upon order, on an application for a certificate so long as sufficient reason therefor appears and until all controversy is determined,* but once a certificate, duly and regularly issued, becomes effective, our authority to terminate it is expressly marked off and limited. *All the antecedent decisions and orders are essentially procedural in*

[1] *Acquisition of Marquette by TWA,* 2 C.A.B. 409, 412 (1940) discussed *supra.*

> *character, and may be set aside, modified, or vacated,* but the certificate marks the end of the proceeding, just as the entry of a final judgment or decree marks the end of a court proceeding" (*Smith Brothers, Revocation of Certificate,* 33 M.C.C. 465 [1942]; emphasis added).

Thus, because no certificate had been put into effect (or even issued) when the press release was published, the release clearly was not a final determination in any sense and could be altered to the extent, if any, that the Board's further study of the record indicated was necessary. The above-mentioned stipulation continued in effect throughout the full period of decision and reconsideration.

When it issued its first actual decision (Order E-13024, of September 30, 1958, J.A. 1313 *et seq.*), the Board inserted provisions into the certificates thereby granted which clearly stated that even then, some six months after the press release, the certificates were not to become effective for a further period of sixty days (J.A. 1379, 1384, 1388, 1394, and 1400). The provisions were inserted in accordance with the Board's customary practice of affording a period of time for reconsideration of certificate-proceeding decisions, despite the lack of provision in the statute itself for such reconsideration (*Kansas City-Memphis-Florida Case,* 9 C.A.B. 401 [1948]). Furthermore, in each certificate the Board reserved a power unto itself to further extend those effective dates if additional time were needed for reconsideration (J.A., *op. cit., supra*). This, too, is a customary Board practice in certificate proceedings.

Under these circumstances, in conformity with the above-cited cases but contrary to Eastern's allegation,

neither the Board nor the industry consider even the first actual Board decision in a certificate case as necessarily the last decision. The industry well knows that a certificate initially issued may be changed on reconsideration before the certificate is made effective. After that effective date, the carriers are justified in believing that the administrative proceeding has been terminated, but prior to the effective date they could entertain such a belief and act thereon only at their peril. Clearly, then, because even the Board's first actual decision is not necessarily the final decision, the Board and the industry cannot and do not consider a mere prior press release of a tentative vote, stated on its face not even to be a decision, to be the Board's final determination in any manner.

The Board is well aware of its power and its duty to deviate from a press release announcement if its "careful marshaling of facts required in drafting an opinion should" thereafter indicate that a different decision is proper (B7). The Board publicly declared this power at the time it instituted the press release procedure in connection with its *New York-Florida Case*, C.A.B. Docket 3051 *et al.*, Order E-10884 (December 21, 1956), and has acted on the basis of its publication ever since. The Board stated that a press release is no more than a public statement of the tentative vote on a given case by a majority of the Board. The vote, the Board said, is no more final in a case in which a press release is issued than it is when a press release is not issued. A proposed decision, the Board continued:

> ". . . does not become effective until an opinion and order containing detailed findings of fact and conclusions of law has been approved, issued and served according to the Board's established pro-

> cedures. Until such time, each Member has retained full power to revise or reverse his vote and his findings on any of the matters under consideration . . ." (C.A.B. Order E-10884, *supra*, p. 17).

And even after that time, until a certificate is made effective, each member retains his right to reconsider his decision, as seen above.

Not only is the Board aware of its power and duty to deviate, but it actually does deviate, from a press release announcement in any way shown to be necessary by further study of the record. Thus, as the Court below was advised, in the Board's *Seven States Area Investigation,* C.A.B. Docket 7454 *et al.*, Order E-13254 (December 8, 1958) (a case of major proportions), the Board's decision differed markedly from its press release announcement—namely, (1) by certificating a route segment to a different carrier than announced in the press release, (2) by extending a route award to a different terminal than the one announced in the press release, and (3) by omitting *any* certification of a route announced in the press release.

Clearly, the inferences which the Court below drew from the record before it were reasonable and justified. This fact only reinforces the usual rule followed by this Court, of non-interference in a situation of this type.

Question Three does not justify review by this Court.

CONCLUSION

For the foregoing reasons, Delta Air Lines, Inc., respectfully submits that a Writ of Certiorari should not issue with respect to Questions One and Three of the Petition for Certiorari in No. 785.

Respectfully submitted,

R. S. MAURER
JAMES W. CALLISON
Legal Division
Delta Air Lines, Inc.
Atlanta Airport
Atlanta, Georgia

ROBERT REED GRAY
1001 Connecticut Avenue
Washington, D. C.
Attorneys for Delta Air Lines, Inc.

FRANK F. ROX
Legal Division
Delta Air Lines, Inc.
Of Counsel

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